No. 212

Brief of Plaintiffs in Error

Filed April 19, 1898

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

Frederick W. Smith, Herbert H. Dixon, Samuel Franklin, et al., plaintiffs in error,
v.
The United States.
No. 212.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

BRIEF FOR DEFENDANT IN ERROR.

# In the Supreme Court of the United States.

OCTOBER TERM, 1897.

---

FREDERICK W. SMITH, HERBERT H. Logan, Samuel Franklin, et al., plaintiffs in error,
*v.*
THE UNITED STATES.
No. 212.

---

**IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF ARIZONA.**

---

## BRIEF FOR DEFENDANT IN ERROR.

---

### STATEMENT.

Frederick W. Smith was duly appointed and commissioned as receiver of public moneys at Tucson, Ariz., on February 28, 1887, and on April 11, 1887, he accepted said office and entered upon its duties, having given bond in the penal sum of $10,000, as prescribed in section 2236 of the Revised Statutes. Subsequently a further bond in the penal sum of $30,000 was executed by him and

his sureties, and delivered to the United States on March 7, 1888. This suit is brought for a breach of the latter bond.

The condition of the bond in suit is that the said Frederick W. Smith having been appointed receiver of public moneys, etc., and accepted said appointment, if he "shall at all times during his holding and remaining in said office carefully discharge the duties thereof, and faithfully disburse all public moneys and honestly account without fraud or delay for the same and for all public funds and property which shall or may come into his hands, then the above obligation to be void and of no effect; otherwise to remain in full force and virtue." (Rec., p. 18.)

The breach of the bond alleged was the neglect and refusal of Smith and his sureties to pay into the Treasury of the United States a balance of $25,468.96, received by him as receiver of public moneys, for the use of the United States, which balance, the complaint alleged, was shown to be due the United States by his account as such receiver, adjusted on the 11th day of April, 1890, by the proper accounting officers of the United States.

Judgment was asked for this sum, with interest at the rate of 6 per cent per annum, from the 11th of April, 1890, and costs. Smith, the principal of the bond, was not served with process, and did not oppose a defense.

To this declaration the defendants in the district court filed a demurrer, and also a general traverse (Rec., 9) and other pleas setting up the following defenses:

1. That a prior official bond, with other sureties, had been given by Smith under his appointment as receiver.

2. That the conditions of the bond set out in the complaint are variant and largely in excess of the bonds prescribed by section 2236, Revised Statutes, and that the bond was extorted by the Secretary of the Interior from Smith and his sureties by threats of removal from office.

3. That on or about November 1, 1889, Smith was removed from office as receiver of public moneys, and thereupon his accounts were adjusted by the proper accounting officer, and nothing was found due the United States.

4. That the items making up the balance sued for were illegally and unlawfully charged to Smith in that they were made up, not from the records and books of his (Smith's) office, but upon *ex parte* affidavits of persons who claimed to have paid moneys to him as receiver for the purpose of making entries of public lands.

5. That the sureties had in their possession at the time Smith's accounts were adjusted in November, 1889, the sum of $25,000, money and property belonging to him, out of which they could have paid the United States the amount now claimed, but that being then informed by the proper officers there was nothing due from him as receiver of public moneys, and relying upon that information, they paid out said sum of money to divers persons at the request of Smith, and that at the time of the commencement of this action Smith was insolvent, etc.

6. That when the balance sued for was ascertained, they, the sureties, requested the United States to retain in its possession the sum of about $1,700, the property of Smith, then in its possession and control, and to apply

the same on any of his indebtedness to the United States due from him, which the United States refused to do.

On these pleadings and the evidence, as appears in the statement of facts proven, and admitted by the defendants, the jury rendered a verdict for the United States in the sum of $5,934.96, and judgment thereon was entered in that sum and for $637.89 costs on February 18, 1891.

This judgment was affirmed on appeal by the supreme court of the Territory of Arizona, and modified by allowing interest on said sum of $5,934.96 from February 18, 1891, until paid; and the case is now here on writ of error.

The record is made as for an appeal, although there was a trial by jury, and it does not appear to be made as prescribed in section 2 of the act of April 7, 1874 (18 Stat., 27). But if the case can be disposed of on the merits, no objection is made to the form of the record.

## ARGUMENT.

It is altogether unnecessary in this case to discuss the assignment of errors. It is shown by the statement of facts in the record, and is expressly admitted in the brief and argument for plaintiffs in error, that Smith during his term of office received, as receiver of public moneys at Tucson, Ariz., from people who had come before him to make entries of public lands the sum of $40,000, in payment for the lands to be entered by them, before the register of the land office had allowed the entries and given his certificate therefor. For this money Smith wholly failed and refused to account to the United States.

It is argued for the plaintiffs in error—and upon this proposition they rest their case—that the money so received was not public money of the United States, because of certain decisions of the General Land Office and the Secretary of the Interior to the effect that money so deposited with a receiver of public moneys, and not accounted for to the Government, is a matter between the depositor and the receiver, and several Land Office decisions to this effect are cited in the brief for plaintiffs in error. For example, Secretary Vilas, affirming the decision of the Commissioner of the General Land Office, held, it is said, in the case of Matthiessen and Ward (6 Land Decisions, p. 714), that—

> Moneys are not payable to receivers of public moneys until an entry has been allowed by the register and a certificate given. If moneys fall into the hands of a receiver, or are sent to him to be afterwards applied to an entry, they are not moneys lawfully paid to the receiver for which the United States is responsible, but are simply individual deposits and are in the nature of a personal trust; such moneys are not received finally because not authorized to be received; they can be received by the register only in his personal capacity as a private individual, and recourse must be had for such deposits against him personally by the parties aggrieved. * * *
>
> A payment received by the local land offices in advance of the time when they are ready to act upon an application and allow the entry is not in pursuance of any duty enjoined by law, and a failure to account for such sum, in the event that the application is refused, is not a default as to any obligation due to the Government, and the sureties would not be liable therefor.

This decision was rendered in a case where Matthiessen and Ward had paid to the receiver of the Eureka land office in Nevada the purchase money of a tract of public land at the time they made an application to enter it. After this payment the application had been refused by the Interior Department. The receiver had then gone out of office, and had not paid back the purchase money to the applicants for entry of the land. His accounts as receiver had not yet been settled, and they simply asked that they be not passed until the money so paid to him be returned to them, or that the bondsmen be held liable for the amount.

Whatever may be said as to the law of this decision, the gross wrong and injustice of the case is manifest. No statute is cited in support of this opinion, and the only decision of a court referred to by the learned Secretary, as bearing on the case, is that of *Potter* v. *United States* (107 U. S., 126), which, it is submitted, announces precisely the contrary doctrine. In that case it was contended that the moneys were paid by preemption claimants to the receiver before there was joint action by the receiver and register allowing the entry claims under the preemption laws, and therefore that the payments made to the receiver were unofficial payments, for which his sureties were not liable. On this point Mr. Justice Woods, delivering the opinion of the court, said:

> In our judgment, this contention has no ground to stand on. There is no expression in the statute which requires the register and receiver to sit at the same time and concurrently pass upon the sufficiency of the proof of settlement and improvement

by preemptors. If the proof is submitted to the register on one day and he is satisfied, there is nothing in the statute which implies that it may not be lawfully submitted, at some subsequent day, to the receiver for his approval. The oath of the preemptor, which is part of the proof required by law, may be taken before either the register or receiver. (Sec. 2262. *Lytle* v. *State of Arkansas*, 9 How., 314.) They are nowhere required to meet and jointly consider the sufficiency of the proof offered. If both are satisfied, that is all the law requires.

* * * * *

If such proof had been made to the satisfaction of Brashear [the register], all that was necessary to complete the right of the preemptor to an entry of the land was the approval of Potter [the receiver], *which was effectually expressed by his receipt of the money.*

The words we have above italicized are decisive as to the character of the moneys paid to the receiver in the case at bar. By receiving the money, either before or after the register had decided on the preemption claim, or other forms of entry for purchase, the receiver, Smith, had "effectually expressed" his approval of the preemption or purchase of the public land desired to be entered. Smith having received this money in the execution of his official statutory functions, the money so received must be regarded, beyond all question and cavil, as public money of the United States.

Payment to the receiver of public moneys of the price of the land desired to be entered, is one of the steps in the proceedings which constitute an entry of the land, and, as we have seen, a valid payment may be made to

the officer by the entryman at any time when he is making the proof on which the entry is to be allowed. Mr. Justice Bradley, delivering the opinion of the court in *Wirth* v. *Branson* (98 U. S., 118, 121), said:

> The rule is well settled, by a long course of decisions, that when public lands have been surveyed and placed in the market, or otherwise opened to private acquisition, a person who complies with all the requisites necessary to entitle him to a patent in a particular lot or tract is to be regarded as the equitable owner thereof, and the land is no longer open to location. The public faith has become pledged to him, and any subsequent grant of the same land to another party is void unless the first location or entry be vacated and set aside.
>
> This was laid down as a principle in the case of *Lytle et al.* v. *The State of Arkansas et al.* (9 How., 314), and has ever since been adhered to. (See *Stark* v. *Starrs*, 6 Wall., 402.) Subsequent cases which have seemed to be in conflict with these have been distinguished from them by the fact that something remained to be done by the claimant to entitle him to a patent, such as the payment of the price, the payment of the fees of surveying, or the like.

When the receiver neglects or refuses to pay over to the United States the money paid to him by the entryman, it is "a breach of the condition of his official bond, both as respects himself and the sureties in the bond, and the United States is under no necessity to proceed against the principal in the bond by an action on the case for money had and received." (*United States* v. *Babbitt*, 95 U. S., 334.)

In the *Yosemite Valley Case* (15 Wall., 91) the right of a preemptioner to pay the purchase money of land de-

sired to be entered before the register allows the entry is distinctly declared. Mr. Justice Field, stating the opinion of the court in that case, said, quoting from the opinion in *Lytle* v. *The State of Arkansas* (18 How., 43):

> It is a well-established principle that when an individual, in the prosecution of a right, does everything which the law requires him to do, and he fails to attain his right by the neglect or misconduct of a public officer, the law will protect him. In this case the preemption right of Cloyes having been proved, and an offer to pay the money for the land claimed by him under the act of 1830, nothing more could be done by him, and nothing more could be required of him under that act. And, subsequently, when he paid the money to the receiver, under subsequent acts, he could do nothing more than to offer to enter the land, which the register would not permit him to do. * * *
>
> There is no question about the correctness of the doctrine here announced.

It would be frivolous, in view of these decisions, to attempt to argue that the register must first act upon the application for entry before the receiver receives the money tendered by the preemptor or purchaser.

As to the decision of the Interior Department, cited in the brief for plaintiffs in error, it is only necessary to say that in respect to the question of what constitutes public moneys in the hands of a receiver,—it is not convincing; and that such rulings have never any force or effect when, in addition to being grossly unjust to private citizens, they are manifestly in conflict with the decisions of this court. The effect of the departmental decisions cited in the brief of the plaintiffs in error would be to

put a premium upon official swindling. Under such decisions no one but a lawyer familiar with Land Office practice could enter a land office to make title to public land and pay therefor, without risk of being defrauded by the very official who holds himself out to the public as the officer who is alone entitled to receive such moneys. The public-land laws were made for the benefit of poor and industrious men, who are not familiar with the practice and decisions of the Land Department of the Government; and certainly Congress did not intend that these laws should be administered contrary to the rules of common honesty and common sense.

The people who settle on our public domain with the intention of obtaining title to a legal subdivision thereof from the Government are not supposed to be versed in hair-splitting refinements and technicalities. When entrymen come before the local land office and pay over the price of the lands they desire to enter, it is not to be expected that they must decide, at their peril, whether the officer receives the money in his "official capacity," or whether such payments "are simply individual deposits in the nature of a personal trust;" whether in one case the title to the money vests in the United States, or, in the other case, whether the receiver takes the legal title to it as trustee for the entryman.

In *Lytle* v. *The State of Arkansas*, *supra*, the court says:

> The adventurous pioneer, who is found in advance of all settlements, encounters many hardships. * * * He is generally poor, and it is fit that his enterprise should be rewarded by the privilege of purchasing the favorite spot selected by him, not to

exceed 160 acres. That this is the national feeling is shown in the course of legislation for many years.

Is it to be supposed for a moment that when one of these pioneers hands over to the receiver the purchase price of a quarter section of land, in the process of proving an entry thereof, such a payment is not valid in every respect? Look at the time and place of the transaction. The time is that of proceeding to prove right of entry; the place, a building with the sign over the door, "United States Receiver of Public Moneys;" within, that officer himself; at hand, a safe for the keeping of the public money; and spread upon the wall, letters patent, granted by the President of the United States, signed and sealed by the Secretary of the Interior, which are to the following effect:

> *To all to whom these presents shall come, greeting:*
>
> Know ye, that reposing special trust and confidence in the integrity, diligence, and discretion of [in this case Frederick W. Smith], I have nominated, and by and with the advice and consent of the Senate, do appoint him to be Receiver of Public Moneys. * * *
>
> And I do authorize and empower him to execute and fulfill the duties of that office according to law, and to have and to hold the said office, with all the rights and emoluments thereunto legally appertaining. * * *

Notwithstanding this certificate of the Government to the "integrity," "diligence," and "discretion" of this "receiver of public moneys," it is argued that the entryman must *beware* how he intrusts money tendered for the purchase of public lands into the hands of the *specially trusted* receiver of public moneys. This argument would

be unworthy of answer were it not that our distinguished opponent is himself an authority upon nearly all questions relating to the public lands of the United States.

The very question here presented was recently decided by the circuit court of appeals for the sixth circuit in *Meads et al.* v. *The United States* (81 Fed. Rep., 684). An elaborate opinion was delivered in that case by the Hon. Charles D. Clark, district judge, and well supported by decisions of the highest authority, in which it is held that moneys paid into the hands of a receiver of public moneys by an entryman before it was payable under a rule of the Interior Department, is public money for which the receiver is liable under his bond.

The Government is the party injured in this suit. The sum of $40,000 was received by Smith in his official capacity in payment for entries of public lands, and it is admitted in the brief for plaintiffs in error (p. 3) that no part of this sum has been paid into the Treasury of the United States. Nor does it appear that a single entry for which any of this money was paid to him, has not been allowed by the register of the land office. Unquestionably the payments so made were valid payments to the United States, and they are now admitted as such, under a more enlightened ruling by the General Land Office as to "payments to the Government." (Rec., p. 146, Exhibit A.)

It appears that at the time Smith was removed from office he had in his possession about $25,000 of the above-mentioned $40,000; that he was then insolvent; that he turned this sum of public money over to Mr. Christy, one of the sureties on his official bond; that

this surety, acting for the other sureties, made an offer to one Harlan (an officer of the Government who had been sent out by the Interior Department to take charge of the receiver's office) to settle Smith's accounts and pay any balance due from Smith to the United States out of the said $25,000, and that Harlan then said there was no balance due. It is alleged in the brief for plaintiffs in error that Christy then refunded this amount to the entrymen who had made payments to Smith until the sum was exhausted. There is no satisfactory evidence in the record that this sum was so refunded. But it is not material whether it was or not, nor what Mr. Harlan or any other Government official said or did. The whole $40,000 was public money, and the payment of any part of it to Smith's creditors, or supposed, creditors, was a criminal misappropriation of public moneys, participated in by everyone of the plaintiffs in error in this suit. (See Rev. Stat., secs. 3617, 3619, 3632, 3639, 5490, 5497.)

As counsel for plaintiffs in error has abandoned all technical objections made in the assignment of errors, and confines his argument to the question as to what constitutes public moneys of the United States, we might properly close the brief for the defendant in error at this point, as it is manifest that if any party in this suit has been injured by the judgment it is the Government and not the plaintiffs in error.

It may be well, however, to notice the ninth assignment (Rec., 160), which objects to the Treasury transcripts as not being competent evidence to prove the balance therein stated. It appears in the record (p. 36),

that the transcript was duly certified under the statute as "a transcript of the books and proceedings of the Treasury Department." If the plaintiffs in error desired this court to pass on this objection, they should have set out the transcript in their bill of exceptions. (*United States* v. *Stone*, 106 U. S., 525, 527.) But this is not now a material question, because on the same page of the record there is an agreement of counsel that the district attorney, Mr. Jeffords, might, instead of calling witnesses to prove that they had paid money to Smith as receiver, introduce such secondary evidence as might be found in "the transcripts or indorsements or memoranda or books in the register's office." Besides this, as already stated, it is admitted by counsel for the plaintiffs in error that Smith received about $40,000 from entry-claimants in payment for public lands, and that he turned over no part of that sum to the United States. Therefore, the only real question in the case is that discussed in the brief for plaintiffs in error, to wit, Was the money so paid to the receiver public moneys of the United States?

As to the validity of the strengthening bond with the penalty of $30,000, section 3639 of the Revised Statutes settles that point beyond any question, as does also section 3624 in respect to the interest allowed on this judgment, the only error being that it should have been allowed "from the time of receiving the money."

JOHN K. RICHARDS,
*Solicitor-General.*

FELIX BRANNIGAN,
*Assistant Attorney.*